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Order 2000- 7-27



UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Issued by the Department of Transportation  
on the 24th Day of July, 2000

Served: July 24, 2000

Joint Application of

**UNITED AIR LINES, INC. and  
BRITISH MIDLAND AIRWAYS LIMITED**

for statements of authorization under 14 CFR 212  
of the Department's Regulations

Docket OST-2000-6842 - 28

Application of

**BRITISH MIDLAND AIRWAYS LIMITED**

for an exemption under 49 U.S.C. section 40109

Docket OST-2000-6954 - 13

**FINAL ORDER**

**Summary**

In this order we are making final our tentative findings and conclusions set forth in Order 2000-5-29, granting United Air Lines, Inc., and British Midland Airways Limited authority to operate certain reciprocal code-share services for a two-year term.

**Applications**

By application filed January 31, 2000, as amended February 17, 2000, United and British Midland jointly requested statements of authorization to enable (1) British Midland to place its designator code on flights operated by United beyond Chicago/Washington, D.C. to 20 U.S. cities;<sup>1</sup> and

<sup>1</sup> Atlanta, Boston, Chicago, Dallas/Ft. Worth, Denver, Houston, Las Vegas, Los Angeles, Miami, New Orleans, New York, Orlando, Philadelphia, Phoenix, Portland, St. Thomas, San Diego, San Francisco, San Juan, and Seattle (see Appendix 1 at 2 of February 17, 2000, Amendment of captioned application in Docket OST-2000-6842).

(2) United to place its designator code on flights operated by British Midland (a) between Manchester and Chicago/Washington, D.C.; (b) between London/Manchester/East Midlands and other points in the United Kingdom and third countries;<sup>2</sup> and (3) United to continue to place its designator code on flights operated by British Midland between London and Brussels, on the one hand, and other U.K. points and third countries, on the other hand.<sup>3</sup> Also on February 17, 2000, British Midland requested exemption authority to support these proposed services.<sup>4</sup>

Continental and Delta filed answers opposing in part the amended joint code-share application and British Midland's exemption application.<sup>5</sup> Continental stated that the applicants were seeking extrabilateral code-sharing authority at Heathrow; that no provision has been made for new entry at Heathrow; that granting the authority requested would entrench the incumbents at the expense of prospective new entrants, enable a U.K. carrier to exploit its slots and facilities at Heathrow without opening Heathrow to additional competition, and reduce the pressure for any significant liberalization at Heathrow; and that the same reasons United opposed code sharing by American and British Airways apply equally here. Delta stated that, in the absence of an agreement with the United Kingdom providing for access for Delta and other U.S. carriers at London Heathrow, the Department should not grant United and British Midland what it termed discretionary code-share authority.

### Show-Cause Order

By Order 2000-5-29, served May 26, 2000, we directed interested persons to show cause why we should not grant (1) British Midland authority to place its designator code on flights operated by United beyond Chicago/Washington, D.C. to the 20 cities listed in footnote 1; and (2) United authority to place its designator code on flights operated by British Midland (a) between Manchester and Chicago/Washington, D.C.; (b) between London/Manchester/East Midlands and other points in the United Kingdom and third countries listed in footnote 2; (3) United authority to continue to place its designator code on flights operated by British Midland between London and Brussels, on the one hand, and other points in the United Kingdom and third countries, on the other

<sup>2</sup> Manchester-Glasgow/Edinburgh/Aberdeen/Dusseldorf/Frankfurt; London (Heathrow)-Paris/Milan/Warsaw/Budapest/Prague/Cologne/Bonn/Stuttgart/Dresden/Hanover/Copenhagen/Geneva/Malaga/Madrid/Barcelona/Berlin/Helsinki/Lisbon/Faro/Rome/Stockholm; and East Midlands-Amsterdam/Frankfurt/Paris.

<sup>3</sup> British Midland was granted statements of authorization to enable it to place United's designator code on flights operated by British Midland between London (Heathrow)-Amsterdam/Belfast/Brussels/Edinburgh/Frankfurt/Glasgow/Leeds/Bradford/Nice/Manchester/Teeside; and Brussels-Birmingham/East Midlands, effective through March 13 and April 14, 2000. British Midland relies on the automatic extension provisions of the Administrative Procedure Act (5 U.S.C. 558(c)), as provided by 14 CFR §377.10 of the Department's regulations, to keep these authorizations in effect pending Department action.

<sup>4</sup> British Midland requested an exemption from 49 U.S.C. section 41301 to permit it (1) to engage in scheduled foreign air transportation of persons, property and mail between Manchester, England, and the coterminal points Chicago, Illinois, and Washington (Dulles), D.C., and (2) to place its airline designator code on flights operated by United Air Lines, Inc., beyond Chicago and Washington, D.C., to 20 U.S. cities.

<sup>5</sup> Continental stated that it did not oppose British Midland's request for Manchester-Chicago/ Washington authority or the British Midland/United request for authority to code share on United flights at Chicago/ Washington connecting with the proposed British Midland Manchester-U.S. flights and on other British Midland flights that do not serve Heathrow. Delta stated that it did not oppose granting British Midland authority to provide service with its own aircraft between Manchester and Chicago/Washington, D.C.

hand, listed in footnote 3, and (4) British Midland the exemption authority it requested in connection with these proposed services.

In our tentative decision, we stated that the authority at issue was consistent with the terms of the Air Services Agreement between the United States and the United Kingdom of Great Britain and Northern Ireland and the 1995 U.S.-U.K. MOC; that, while we were sensitive to the issues raised by the respondents regarding additional U.S.-carrier access at London's Heathrow airport, we did not perceive withholding the authority here as furthering that end; that we remained unconvinced that competitive considerations compel withholding any of the authority currently being sought; and that the proposed service would add competitive benefits by introducing a dynamic additional presence in the U.S.-U.K. and U.S.-third-country markets.

### **Responsive Pleadings**

Comments objecting to Order 2000-5-29 were filed by Delta and Continental, as well as by American Airlines and Trans World Airlines (TWA).<sup>6</sup> United Air Lines and British Midland filed replies to the comments.

The opposing parties generally reemphasize their earlier arguments against grant of the authorities requested in these dockets. Specifically, they point to the lack of new opportunities for U.S. carriers at London's Heathrow Airport and voice their concerns about the competitive impact of the carriers' proposed operations. They state that the Department should not approve the United/British Midland code share until there is a new U.S.-U.K. aviation agreement liberalizing Heathrow operations and ensuring the introduction of new competition by U.S. airlines. They also assert that the requested authority is extrabilateral and the current state of U.S.-U.K. aviation relations does not support its approval. In addition, American continues to argue that the Department should not finalize Order 2000-5-29 until it has fully approved the British Airways/American code-share and exemption applications in Docket OST-99-6507.

United and British Midland state that objections to the show-cause order raise no issues which the Department has not already considered; that, while they share U.S.-carrier aspirations to open Heathrow to more competition, the Department has already rejected any linkage between their code-share services and expanded U.S.-carrier access to Heathrow; and that their limited code-share operations do not raise competitive issues of the same magnitude as those raised by the more extensive American/British Airways arrangement.

### **Decision**

We have decided to finalize our tentative findings and conclusions in Order 2000-5-29. We have carefully considered the objections and answers filed in response to Order 2000-5-29, and find that finalization of that order is in the public interest.

As we noted in the show-cause order, the authority at issue here is consistent with the terms of the Air Services Agreement between the United States and the United Kingdom of Great Britain and

<sup>6</sup> While American and TWA did not object to the amended application, we note that they filed answers in opposition to the application as originally filed.

Northern Ireland and the 1995 U.S.-U.K. MOC; and British Midland has been properly designated to conduct the proposed services.<sup>7</sup>

The objectors have presented no new evidence that would cause us to alter our tentative findings and conclusions set forth in Order 2000-5-29.<sup>8</sup> In particular, we stated in that order our sensitivity to U.S. carrier concerns regarding expanded access at London's Heathrow airport. However, we remain unpersuaded that our action finalizing Order 2000-5-29 conflicts with our objective of achieving additional entry for U.S. carriers at Heathrow. We stress our serious commitment to pursuing this goal through ongoing negotiations with the United Kingdom. To this end, U.S. and U.K. delegations recently met for further discussions of an open-skies aviation regime and will resume negotiations in the fall.

Further, we remain unconvinced that there are any competitive considerations stemming from the proposed United/British Midland code-share arrangement that would warrant withholding any of the authority at issue here. In Order 2000-5-29, we acknowledged the fact that further service enhancements of carriers already present at Heathrow could, to the degree that they translate into adverse effects on competition, have a negative impact on the market. We also recognized that, given the particular circumstances of the applications at issue here, any such potential problems would be offset by the addition of competitive benefits and the potential for facilitating further opportunities for consumers. We continue to hold these views.

Finally, the American/British Airways application is under consideration on its own merits in Docket OST-99-6507, and we do not see a public interest basis to withhold the bilaterally-agreed authority at issue here until we reach a decision in that case.

#### ACCORDINGLY,

1. We make final our tentative findings and conclusions set forth in Order 2000-5-29;<sup>9</sup>

<sup>7</sup> We are also finalizing our finding as to British Midland's operational and financial qualifications, and ownership and control, based on the May 25, 1989, U.S.-U.K. Exchange of Notes under which the aviation authorities of each country will normally accept, on a reciprocal basis, the other's fitness and citizenship determinations in regard to carriers seeking authority to conduct certain bilateral services, including the requested authority.

<sup>8</sup> American, in its objection to our show-cause order, included a statement that any authority granted to United and British Midland should exclude service to Spain because the U.S.-Spain aviation agreement does not provide for code sharing and the Department has refused to grant extrabilateral authority to serve Spain. It has been our general practice in determining the public interest in cases of this kind, to look primarily to our aviation relationship with the homeland of the applicant foreign carrier. Here, the authority at issue is provided for in our relationship with the United Kingdom and, given the specific facts in this case, we see no reason to limit that authority based on limitations that exist in our aviation agreement with Spain. Of course, the applicants must obtain the requisite authority from each third country involved in order to operate these services and, with respect to Spain, they have recognized that such authority may not be immediately forthcoming.

<sup>9</sup> Since all interested parties have had the opportunity to file comments in this proceeding, we will not entertain petitions for reconsideration.

2. We grant British Midland Airways Limited an exemption from section 41301 of Title 49 of the U.S. Code to permit it to engage in scheduled foreign air transportation of persons and property between Manchester, England, and the coterminal points Chicago, Illinois, and Washington (Dulles), D.C.; and beyond Chicago and Washington, D.C., to Atlanta, Boston, Chicago, Dallas/Ft. Worth, Denver, Houston, Las Vegas, Los Angeles, Miami, New Orleans, New York, Orlando, Philadelphia, Phoenix, Portland, St. Thomas, San Diego, San Francisco, San Juan, and Seattle pursuant to a code-share arrangement with United Air Lines, Inc.;
3. We grant British Midland Airways Limited a statement of authorization pursuant to 14 CFR 212 of the Department's regulations to permit it to place the airline designator code of United Air Lines, Inc., on flights operated by British Midland (a) between Manchester and Chicago/Washington, D.C.; and (b) between London/Manchester/East Midlands and other points in the United Kingdom and third countries (listed in footnote 2);
4. We grant United Air Lines, Inc., a statement of authorization pursuant to 14 CFR 212 of the Department's regulations to permit it to place the airline designator code of British Midland Airways Limited on flights operated by United beyond Chicago/Washington, D.C. to the 20 cities listed in ordering paragraph 1 above;
5. We renew the statements of authorization currently held by British Midland Airways Limited to permit it to continue to place the airline designator code of United Air Lines, Inc., on flights operated by British Midland between London and Brussels, on the one hand, and other points in the United Kingdom and third countries, on the other hand (listed in footnote 3);
6. British Midland and United may operate services and carry traffic (including "blind sector traffic," as defined in 14 CFR 216 of the Department's Regulations) as provided for in section 5 of Annex 1 to the Air Services Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;
7. The authorities granted above will be effective immediately and will remain in effect for two years after the date this order issues;
8. Our actions described above will be subject to the exemption and code-share conditions attached to this order;
9. Our actions described above will be subject to amendment or modification, at our discretion and without hearing, should such action be necessary in the public interest;
10. To the extent not granted, we deny all requests for relief in Dockets OST-2000-6842 and OST-2000-6954;
11. Our actions would not constitute major regulatory actions under the Energy Policy and Conservation Act of 1975; and
12. We will serve a copy of this order on British Midland Airways Limited, United Air Lines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Trans World Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc., the Washington Parties, the St. Louis Parties, Manchester Airport PLC, the

Ambassador of the United Kingdom of Great Britain and Northern Ireland in Washington, D.C., the Department of State (Office of Aviation), and the Federal Aviation Administration (AFS-200).

By:

**A. BRADLEY MIMS**  
Acting Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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[http://dms.dot.gov/reports/reports\\_aviation.asp](http://dms.dot.gov/reports/reports_aviation.asp)*

**FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY**

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:
  - (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or
  - (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, comply (except as otherwise provided in the applicable bilateral agreement) with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

**CODE-SHARE CONDITIONS**

**United Air Lines, Inc./British Midland Airways Limited - Docket OST-2000-6842**

The code-share operations authorized here are subject to the following conditions:

- (1) United Air Lines and/or British Midland Airways must promptly notify the Department if the code-share agreement providing for the code-share operations is no longer effective or the carriers decide to cease operating any or all of the approved code-share services. Such notices should be filed in Docket OST-2000-6842.<sup>1</sup>
- (2) The code-sharing operations conducted under this authority must comply with 14 CFR 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected; and that the operating carrier shall not permit the code of its U.S. code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.
- (3) The authority granted here is specifically conditioned so that neither carrier shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

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<sup>1</sup> We expect this notification to be received within 10 days of such non-effectiveness or of such decision.